LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 2 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1968

No. 83

AMERICAN MANUFACTURING CO. OF TEXAS,
Petitioner,
v.
THE HEALD MACHINE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

NORMAN S. BLODGETT,
39 Highland Street,
Worcester, Massachusetts 01608,
GILBERT L. WELLS,
1007 Pennsylvania Building,
Washington, D.C. 20004,
Counsel for Respondent.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

In the Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 1419.

AMERICAN MANUFACTURING CO. OF TEXAS,
Petitioner,
v.
THE HEALD MACHINE COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

The petitioner has based its request for the issuance of the writ on two major areas, *i.e.*, jurisdiction and the interpretation of the trademark statute.

I. Jurisdiction.

The petitioner's argument is that there is some question as to whether the Supreme Court has the power to determine disputed questions of *trademark* law previously decided in the Court of Customs and Patent Appeals. It says that the question of the Supreme Court's jurisdiction over such cases is in doubt and should be resolved once and for all.

It is the contention of the respondent that this jurisdiction has never been since 1927 and is not now in doubt. The Supreme Court has, since time immemorial, been understood to have jurisdiction to review the final decisions of administrative tribunals, such as the C.C.P.A. If there were ever any doubt introduced by the *Postum* case in 1927, that doubt has been resolved by the clear wording of 28 U.S.C. 1256. The mere fact that there is *no recorded* case of a trademark case from the C.C.P.A. being reviewed by the Supreme Court is no reason for doing so now. As a matter of fact, there have been very few *patent* and *customs* cases of the C.C.P.A. which have been reviewed by the Supreme Court.

The absence of such reviews of trademark cases does not indicate *doubt* as to the Supreme Court's jurisdiction—it only indicates that the C.C.P.A.'s decisions over the years have seemed reasonable and did not require review.

The petitioner makes the mistake of arguing that *Brenner* v. *Manson* only applies to *patent* cases. On the contrary, the only possible reading of the case leads to the conclusion that the Supreme Court can review *any* case decided by the C.C.P.A. The same arguments used by the Court would apply to trademarks as well as to patents. Mr. Justice Fortas starts the decision with the following words:

> "This case presents two questions of importance to the administration of the patent laws: First, whether this Court has certiorari jurisdiction, upon petition of the Commissioner of Patents, to review decisions of the Court of Customs and Patent Appeals; . . ."

and he ends by saying:

> "The contrary is more plausible: that by using broad and unqualified language, Congress intended our cer-

tiorari jurisdiction over CCPA cases to be as broad as the Constitution permits.". *Brenner* v. *Manson*, 383 U.S. 519, 520, 527.

II. Merits of the Case.

In applying the trademark statutes the C.C.P.A. has had to determine the issue of whether the use by the petitioner of his trademark "BORMASTER" is "likely . . . to cause confusion" in view of the respondent's registered trademark "BORE-MATIC."

This issue, which is determinative of the case, must be resolved by a value judgment on the part of the judicial authority. Over the years, certain "tests" have been evolved to help the judge in reaching his verdict, but, ultimately, the result must be reached more or less intuitively.

The petitioner, however, would have the Supreme Court tell the C.C.P.A. that the majority either used the wrong "test" or applied the proper test wrongfully.

The DISCRIMINATING PURCHASER doctrine is such a "test." It says that, if the goods of the two parties are expensive, etc., then they can be closer in nature without the purchasers being confused as to their source. The petitioner says that the *Dobeckmun* case introduced *doubts* in the mind of the Patent Office, etc. This is entirely contrary to the fact: the C.C.P.A. in the *Dobeckmun* case was simply split in their value judgment of the facts—they were *not* split or in doubt as to the law that should be applied to the facts.

Similarly, the *American Steel Foundries* case and others have held that another "test" or factor to be used in making the value judgment is the secondary level judgment of whether the marks under consideration were SUGGESTIVE. Here again, this is not a case of the *law* being in doubt,

but a case where the judges on the C.C.P.A. used the same and the proper test, but reached different conclusions, as all men often do.

The petitioner attempts to make a point that the Supreme Court should review the present case because the C.C.P.A. and the Court of Appeals for the District of Columbia differ in whether they will accept evidence of third-party trademark registrations. However, such a question of admissibility *never came up* in the present case! So far as this case is concerned, the question is moot.

In conclusion, then, the petitioner is asking the Supreme Court to resolve a doubt as to the application of tests that case law has evolved to assist judges in making their value judgment on the ultimate fact of "likelihood of confusion." It is the respondent's point that there is no such *doubt*, but only differences of intuitive conclusions reached in somewhat similar cases. A close analysis of the dissenting opinions in the C.C.P.A. decision shows that the dissenters did not disagree with the majority as to the applicable law, but only as to the *conclusions* reached by applying that law.

The respondent asks that the petition for writ of certiorari be denied.

Respectfully submitted,

THE HEALD MACHINE COMPANY,
By NORMAN S. BLODGETT,
39 Highland Street,
Worcester, Massachusetts 01608,
GILBERT L. WELLS,
1007 Pennsylvania Building,
Washington, D.C. 20004.